

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

DISTRICT OF COLUMBIA

JANUARY TERM, 1945

No. 8807

HERMAN A. SETSER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

and

No. 8808

MARION J. SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA

EDWARD M. CURRAN,

United States Attorney,

T. PETER ANSBERRY,

Assistant United States Attorney,

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FILED JAN 12 1945

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(i)

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MARION J. SMITH, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal is taken by the appellants who were indicted, tried, and convicted together of housebreaking and larceny. On appeal it is assigned that the court erred in permitting government counsel to cross-examine the appellant Smith regarding his prior convictions and in permitting government counsel to refer to the appellants as "crooks"; that the court committed error in not charging the jury regarding the failure of the appellant Setser to testify; and that the appellants were not properly represented at the trial.

The defendants were charged by indictment No. 73378 in the District Court with housebreaking and larceny in that they did, on, to wit, the 10th day of February 1944, enter the dwelling of one Christine C. Jordan with intent to commit larceny and did steal her coat of the value of fifty dollars and another coat belonging to Salita C. Cook of the value of fifty dollars. At the trial the said Christine C. Jordan testified that her coat and that of her sister, Salita C. Cook, were hanging on the same coat rack in their home at premises 1316 Nineteenth Street NW., and that during the night of February 9-10, 1944, both coats disappeared. She reported the matter to the police and shortly afterwards they produced her coat. She admitted that its value was probably less than fifty dollars. She was not acquainted with either defendant.

A police officer testified that about 3: 10 a. m. on February 10, 1944, at Nineteenth and N Streets NW., he saw the appellants together, and Setser had a coat in his possession and he and Smith were both looking at it. They told him in answer to his questions that the coat belonged to Setser's girl friend and they were taking it to the cleaners. The officer, now joined by a fellow officer, asked if the cleaners would be open at that hour and appellant Smith replied that they were bringing the coat from the cleaners. Appellant Setser at the time was under the influence of liquor. The officers thereupon arrested both appellants and seized the coat. It does not appear that the coat of Mrs. Cook was ever found. A precinct detective testified that when he questioned the appellants at the Third Precinct, on the early morning of February 10, they told him they found Mrs. Jordan's coat hanging on a hedge near Nineteenth and N Streets.

Appellant Smith testified in his own defense to the same effect, that is, that he and Setser found the coat hanging on a hedge near Nineteenth and N Streets. On cross-examination he admitted convictions of certain criminal offenses and explained in two of them the conviction was due to evidence improperly received.

In argument counsel for the government referred to the appellants as "crooks." The record does not contain any more

of said counsel's argument and contains nothing of the argument of counsel for the appellants. The court correctly instructed the jury on the law. The court was not requested to, and did not, instruct the jury on the law relating to the appellant Setser's failure to testify. At the request of appellant's trial counsel, the court instructed the jury that there was not sufficient evidence to warrant a verdict of guilty as to the theft of the coat belonging to Salita C. Cook, which was not recovered, and, therefore, their verdict on the larceny count, if guilty, should be guilty of petit larceny and not grand larceny.

ARGUMENT

Appellants' attorney is unable to find in the record any error upon which to urge reversal and submits the appeal on the record. Appellee, after examining the record, is of the view that no error was committed in the trial. A brief reference will be made to the assignments of error and they will be discussed in the order in which made.

It is assigned that the court erred in permitting the Assistant United States Attorney to cross-examine the appellant Smith as to his prior conviction of crime. Such cross-examination is permitted by 14-305 District of Columbia Code, 1940, which provides, among other things, that a conviction of crime may be given in evidence to affect the credit of a witness "either upon the cross-examination of the witness or by evidence aliunde." It is not necessary to cite authority to the effect that the "witness" referred to includes the defendant in a criminal case when he makes himself one.

It is assigned that the appellants were not properly represented. There is nothing in the record to prove that, but there is considerable indication to the contrary. Appellants' counsel moved for a severance before trial and moved to suppress the evidence. He also successfully opposed a motion of the United States to consolidate the instant indictment with three others for trial. These facts appear from the docket entries (Record on Appeal pp. D-J incl.). It also appears from the record (R. 9, Appendix 13) that the attorney brought out from the complaining witness on cross-examination the statement

that her coat was of a value of less than fifty dollars, and that when the court instructed the jury the attorney persuaded the court to direct the jury not to convict the appellants of the larceny of the coat of Mrs. Cook, the sister of the complaining witness. Compare *Edwards v. United States*, 78 App. D. C. 226, 130 F. (2d) 365, where Edwards was convicted of the larceny of a large quantity of property only some of which was recovered.

It is assigned that the court erred in not instructing the jury on the law regarding the failure of an accused to take the stand in his own defense. No such instruction was requested and it is the practice in this district, and undoubtedly a fair one, for courts not to comment upon that subject unless requested to do so. Many experienced criminal lawyers prefer to have the matter not mentioned. If the request is not made there is no error in the court's not charging. *Harris v. United States*, 59 App. D. C. 353, 355, 41 F. (2d) 976 (1930).

Finally appellants assign that the court committed error in permitting the Assistant United States Attorney in his argument to the jury to refer to the appellants as "crooks." No objection was made at the time of the occurrence. If objection had been made, it is fair to assume that the court would have instructed the jury to disregard it and that government counsel would have withdrawn the statement. That was done in *McHenry v. United States*, 51 App. D. C. 119, 276 Fed. 761, a murder case wherein the prosecutor referred to the defendant as a "villain." In the case of *Simpson v. Stein*, 52 App. D. C. 137, 284 Fed. 731, this court said that in order to justify reversal for comment of an attorney (this was a civil case) it must appear that the misconduct was critical or at least serious and that the trial court, after objection duly made, failed to take appropriate action. Particularly applicable here are the words of this Court in *Fields v. United States*, 27 App. D. C. 433, 449, wherein the prosecutor referred to the defendant as a common thief and a robber of widows and orphans. This Court in refusing to reverse for that reason said:

Though unfortunately not uncommon in the course of the trial of closely contested cases, invective is always

in bad taste. Where, however, it is founded on the evidence in the case on trial, and relates to the final conclusion which that evidence tends to establish, its permission by the court does not amount to reversible error.

In the instant case the jury reached the same conclusion as the prosecutor in more formal and temperate language.

The foregoing are the only errors assigned in appellants' brief. However, it does appear from the docket entries that a motion was made seasonably before trial to suppress evidence. This evidence would, of course, be the coat of Mrs. Christine C. Jordan, which the officers apparently seized from the appellants as an incident to their arrest. It is submitted that the circumstances as shown by the record on this appeal are sufficient to confirm the presumption that ought to follow the trial court's finding after hearing that the arrest and seizure were proper. Finding two men, one of them intoxicated, in possession of a woman's fur coat at 3 o'clock in the morning, with the implausible and contradictory explanations that they are taking it and bringing it from a cleaning establishment, was sufficient to create a reasonable suspicion in the minds of the officers that the appellants had stolen the coat. They were also justified in concluding from the swift appraisal at hand that it might well be over the value which would make its theft a felony under our larceny statute, 22-2201 D. C. Code 1940. Compare in this respect *Maghan v. Jerome*, 67 App. D. C. 9, 88 F. (2d) 1001.

No point is made of the sufficiency of the evidence. The possession of property recently stolen from a dwelling (R. 8, App. 13) warrants an inference by the jury that the possessor committed the theft and the housebreaking. *Edwards v. United States*, 78 App. D. C. 226, 229, 130 F. (2d) 365, cert. denied 64 S. Ct. 523 (1943).

CONCLUSION

It is respectfully submitted that the appellants were properly represented at the trial, were properly convicted on admissible

evidence, and suffered no serious prejudice at any part of their trial and accordingly the judgment should be affirmed.

Respectfully submitted.

EDWARD M. CURRAN,
United States Attorney.

T. PETER ANSBERRY,
Assistant United States Attorney.

CHARLES B. MURRAY,
Assistant United States Attorney.

APPENDIX

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G. J. No. Orig.
Criminal No. ——.
HOUSEBREAKING AND LARCENY.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF
COLUMBIA

• Holding a Criminal Term

January Term, A. D. 1944

DISTRICT OF COLUMBIA, ss:

THE GRAND JURORS of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Herman A. Setser and one Marion J. Smith, on, to wit, the tenth day of February 1944, and at the District of Columbia aforesaid, the dwelling of one Christine C. Jordan, there situate, feloniously did enter, with intent to commit therein the crime of larceny, to wit, with intent the goods, chattels, and property in the said dwelling, then and there being, feloniously to steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

SECOND COUNT

AND THE GRAND JURORS AFORESAID, upon their oath aforesaid, to further present:

That one Herman A. Setser and one Marion J. Smith, on, to wit, the tenth day of February 1944, and at the District of Columbia aforesaid, one coat, of the value of fifty dollars, of the goods, chattels and property of one Christine C. Jordan; and one coat, of the value of fifty dollars, of the goods, chattels, and property of one Salita C. Cook, then and there being found in the dwelling referred to in the first count of this indictment feloniously did steal, take, and carry away; against the form of

the statute in such case made and provided, and against the peace and government of the said United States.

EDWARD M. CURRAN,
*Attorney of the United States in
and for the District of Columbia.*

A TRUE BILL:

EDGAR F. McINTIRE,
Foreman.

In the District Court of the United States for the District of
Columbia

Holding a Criminal Term

Crim. No. 73378

UNITED STATES OF AMERICA

vs.

MARION J. SMITH
HERMAN A. SETSER

BILL OF EXCEPTIONS

Be it remembered, that this cause came on for trial on June 19, 1944, before Mr. Justice Letts in Criminal Court No. 2 of the United States District Court for the District of Columbia. The United States of America was represented by Mr. Ansburry, Assistant United States Attorney, and the defendants were represented by J. C. Rhodes, Esquire, and P. M. Rhodes, Esquire. The jury being satisfactory to counsel for both sides was duly sworn to try said cause.

Whereupon, counsel for the Government made an opening statement of what the Government expected to prove.

CHRISTINE C. JORDAN testified that she and her sister, Salita C. Cook, resided at 1316 19th Street NW., in the District of Columbia, and that they were living there during February 1944. The witness testified that she was the owner of a certain fur coat which was kept in her residence. On February 9, 1944, witness' fur coat was hanging on a coat rack which was located in her home close to the front door. She testified that

on that date the front door was unlocked and that for part of the time the key was in the lock on the outside. According to her testimony at about 7:00 a. m. February 10, she found that the coat and another coat belonging to her sister had been removed from the said coat rack. She thereupon reported the matter to No. 3 Police Precinct. She testified that she had given no one permission to remove either coat from her house. Shortly after reporting the matter to the police, several officers appeared at her home and showed her a fur coat which she identified as hers and as the same coat which she had reported missing.

On cross-examination she admitted the value of the coat was probably less than \$50.00. That she had never seen either defendant near her home or anywhere else prior to February 10, 1944.

Pvt. ELWOOD G. LOMAX testified that he was a member of the Metropolitan Police Department. That at about 3:10 a. m., February 10, he was on duty as an officer at 19th and N Streets NW., in the District of Columbia. At that time and place he observed two men standing under a street light, examining a woman's fur coat. The witness testified he then joined Reed P. Maughn, also a police officer, and approached the two men. Witness testified that the two men approached were Setser and Smith, defendants herein. According to the witness, Setser had possession of the coat, although both men were looking at it. Witness asked defendants what they were doing with the coat and to whom it belonged. Defendants replied that the coat belonged to a girl friend of defendant Setser and that they were taking it to the cleaners with her consent.

Witness testified he then asked if the cleaners was open at that hour of the morning. Defendant Smith then replied that they were bringing it from the cleaners; whereupon witness placed the defendants under arrest and took them to No. 3 Police Precinct.

Witness testified that both the defendants appeared to be drinking and that defendant Setser was obviously under the influence of liquor.

REED P. MAUGHN testified substantially the same as preceding witness Lomax.

PRECINCT DETECTIVE ROBERT G. KIRBY testified that he was a member of the Metropolitan Police Department and assigned to No. 3 precinct. That early in the morning of February 10, 1944, he met the defendants in No. 3 precinct and questioned them about the aforementioned fur coat. Defendants advised him that they had found the coat hanging on a hedge in the vicinity of 19th and N Streets NW., in the District of Columbia.

The government then rested and counsel for defendants made an opening statement as to what he expected to prove; thereupon

MARION J. SMITH testified in his own defense that he and defendant Setser had found the coat hanging on a hedge near 19th and N Streets NW., in the District of Columbia. He denied any knowledge of housebreaking or larceny and testified he did not know how the coat had gotten on the hedge. On cross-examination he admitted having a criminal record and admitted that he had pleaded guilty to, and been adjudged guilty of, certain crimes in the District of Columbia. He alleged that in two cases wherein he was convicted the conviction was due to evidence improperly received. He admitted that the convictions referred to were final and that no appeal had been made.

Defendant Setser did not testify at the trial.

Thereupon the Government rested and the defense rested. The matter was then argued to the jury by counsel for both sides. In his argument counsel for the Government referred to the defendants as "crooks."

Judge instructed the jury generally regarding the charges brought against defendants. No instruction was given regarding the failure of defendant Setser to testify and counsel for defense requested no such instruction. On motion of counsel for defendants he instructed the jury that there was insufficient evidence to warrant a finding that either defendant had stolen the coat belonging to Salita C. Cook. Also, at request of counsel for defendants, he instructed the jury that there was insuf-

ficient evidence to warrant a finding that the coat belonging to Christine C. Jordan was valued at more than \$50.00. He instructed the jury that if they found the defendants guilty of larceny of the coat it should be petty larceny not grand larceny. No exceptions were taken to the charge. The jury then retired and later returned and reported that it had agreed upon a verdict and that the verdict was, as to first count: both defendants guilty as indicted. As to the second count of the indictment: the verdict was, as to both defendants, guilty as to petty larceny.

The foregoing is the substance of all the testimony bearing upon the exceptions herein reserved on behalf of the defendant. Thereupon defendant tenders this, his bill of exceptions, and requests the Court to sign and seal the same, which is accordingly done, nunc pro tunc, this 12th day of October 1944.

F. DICKINSON LETTS,
Justice.

Approved:

TIMOTHY PETER ANSBERRY,
Assistant United States Attorney.
JOHN T. BONNER,
Attorney for Defendants,
426 Fifth Street NW., Washington, D. C.